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No. 00-1249

IN THE
Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,
Petitioners,

v.

CHICAGO PARK DISTRICT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF PETITIONERS

BONNIE I. ROBIN-VERGEER
Counsel of Record
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

JULY 2001 *Counsel for Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

This brief in support of petitioners is submitted by Public Citizen, Inc. ("Public Citizen"). Public Citizen is a nonprofit research, lobbying, and litigation organization based in Washington, D.C., with approximately 150,000 members nationwide. Public Citizen advocates for consumer rights in the marketplace, safe products, a healthy environment and workplace, clean and safe energy resources, and corporate and government accountability.

Public Citizen has no direct stake in this Court's determination of whether the Chicago Park District's regulation of free speech in Chicago parks is analyzed as a prior restraint and, if so, which of the procedural safeguards imposed in *Freedman v. Maryland,* 380 U.S. 51 (1965), are applicable. Nevertheless, Public Citizen is concerned about how the Court's decision in this case may affect the myriad of other contexts in which government-mandated licensing regimes effect a prior restraint on speech.

For example, numerous state and local jurisdictions have enacted licensing schemes that require nonprofit organizations such as Public Citizen to register, pay a filing fee, and submit detailed information about their operations and fundraising efforts as a condition of sending any communications into the jurisdiction, including solicitations for charitable contributions. Direct mail campaigns are the primary means by which Public Citizen (and many other charities) communicate with and educate the public; these mailings highlight the projects, causes, and issues promoted by the charity and urge current

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no counsel for any party to this case authored this brief in whole or in part, and no person or entity other than this amicus and its counsel has made a monetary contribution to its preparation and submission. All parties to the case have consented to the filing of this brief, and the letters of consent have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

and prospective members to support these endeavors and become engaged in the political process. Charitable solicitation laws that prohibit this speech—unless the charity first obtains a permit from any locality that requires one—seriously hamper the ability of nonprofit organizations such as Public Citizen to carry out their mission and create the potential for censorship by government regulators based on the content of the organization's speech.

Thus, at a bare minimum, these licensing regimes must be accompanied by procedural safeguards to alleviate the risk of censorship and to prevent any delay in the issuance of a permit. Public Citizen is currently challenging the constitutionality of one charitable solicitations licensing regime that, in its view, lacks such safeguards, *see Public Citizen v. Pinellas County*, Civil Action No. 8:01-CV-943-T-23TGW (M.D. Fla.), *available at* http://www.citizen.org/litigation/briefs/PinellasComp.htm, and has brought similar constitutional challenges in the past. Any decision by this Court in the instant case determining the procedural safeguards that must accompany a prior restraint of speech may affect not only the facial validity of the county ordinance that Public Citizen contests in its case, but the constitutionality of a host of charitable solicitation regulatory regimes and other types of permitting schemes nationwide.

Public Citizen's view, as explained below, is that the court of appeals erred in refusing to apply the *Freedman* procedural safeguards in the context of a park permitting system. We are concerned that the lower court's analysis, if adopted by this Court, will seep into other settings involving prior restraints on speech. But even if this Court agrees with the lower court, Public Citizen believes that it is important for this Court to distinguish between the licensing of speech that involves a limited governmental resource, such as a park, and speech that occurs in a context where there is no competition for scarce space and accordingly no need for regulation in advance of speech. Prior restraints in the latter context lack a compelling justification, pose a significant potential for censorship and

delay in the issuance of a permit, and therefore should be accompanied by the full panoply of *Freedman* protections.

For these reasons, Public Citizen believes that this brief will add an important perspective to the consideration of the First Amendment principles at stake here, and one that might otherwise not be presented for the Court's review.

STATEMENT OF THE CASE

The Chicago Park District regulates the use of all parks in the city through a licensing ordinance ("ordinance"). That ordinance requires that anyone seeking to use amplified sound or to hold a rally that involves fifty or more persons in a city park must first obtain a permit. Chi. Park Dist. Code ch. VII § C (Pet. App. 91a-92a). The ordinance does more, however, than authorize a government official to undertake the ministerial tasks of taking names and contact information from those who propose to use the parks and resolving scheduling conflicts among various parties competing for use of the same space. Instead, it authorizes (but does not require) the denial of permits on the basis of various discretionary criteria listed in the Ordinance. *Id.* § C(5)(e) (Pet. App. 96a-98a).[2]

Because the ordinance does not purport to allow the city to deny a permit based on the content of the message to be

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[2] *See, e.g., id.* § C(5)(e)(3) (authorizing denial because the application "contains a material falsehood or misrepresentation") (Pet. App. 97a); *id.* § C(5)(e)(5) (authorizing denial because the applicant "has on prior occasions damaged Park District property and has not paid in full for such damage") (Pet. App. 97a); *id.* § C(5)(e)(13) (authorizing denial where the applicant "has violated the terms of prior permits issued to the applicant") (Pet. App. 98a); *see also id.* § C(6)(c) (providing that "[a]ny requirements for use fees, deposits, proof of insurance or premium for insurance may be waived . . . if the activity is protected by the First Amendment of the United States Constitution and the condition would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity") (Pet. App. 100a).

conveyed by the permit applicant, the Court of Appeals for the Seventh Circuit concluded that the licensing scheme should be treated as a time, place, and manner regulation that is not subject to the rules regarding prior restraints on speech. Accordingly, the court held that the procedural safeguards announced in *Freedman v. Maryland,* 380 U.S. 51 (1965), did not apply, and thus, that the Park District did not bear the burden of seeking judicial review before it denied a permit. *See Thomas v. Chicago Park Dist.,* 227 F.3d 921-26 (7th Cir. 2000) (Pet. App. 2a-8a); *accord MacDonald v. City of Chicago,* 243 F.3d 1021, 1032 (7th Cir. 2001) (relying on the *Thomas* analysis in a case involving an application by the same parties for a parade permit under a similar ordinance). Moreover, because it believed that regulation of parks poses a lesser threat of censorship than licensing regimes involving adult businesses, the court below also found no fault with the ordinance's failure to require a prompt judicial disposition of any challenge to the Park District's refusal to issue a permit. *Thomas,* 227 F.3d at 927-28 (Pet. App. 11a-12a).

SUMMARY OF ARGUMENT

1. The Chicago Park District's ordinance requires that anyone seeking to use amplified sound or to hold a rally that involves fifty or more persons in a city park must first obtain a permit. Because this permitting scheme gives "public officials the power to deny use of a forum in advance of actual expression," *Ward v. Rock Against Racism,* 491 U.S. 781, 795 n.5 (1989) (quoting *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975)), it imposes a prior restraint on speech and therefore must avoid the twin evils of unbridled discretion left in the hands of a government official and an absence of adequate procedural safeguards to guarantee the prompt issuance of the permit. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 225-26 (1990) (O'Connor, J., joined by Stevens and Kennedy, JJ.). The requisite safeguards were announced in *Freedman v. Maryland,* 380 U.S. 51 (1965), and have been repeatedly reaffirmed by this Court.

Because a park is "a limited space" that calls for some government regulation to mediate conflicts between competing speakers, and because the ordinance does not purport to authorize the city to deny a permit based on the content of the speaker's message, the Seventh Circuit concluded that the permitting regime should be treated as a time, place, and manner regulation that is not subject to the normal rules, including the *Freedman* safeguards, that this Court has held govern prior restraints on speech. This conclusion was in error. These two conceptual First Amendment frameworks are not mutually exclusive. Although this Court has recognized the government's power to regulate competing uses of public forums by requiring a permit for those who wish to hold a march, parade, or rally, *see Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992), the Court has nonetheless treated any such permitting scheme as involving a prior restraint of speech that must satisfy additional constitutional requirements—namely, the *Freedman* procedural protections and the requirement of "narrow, objective, and definite standards to guide the licensing authority" in the issuance of a permit. *Id.* at 131 (citation omitted).

This Court's precedents establish that when a regulation concerning speech does not authorize the suppression of speech in advance of its expression, *see, e.g., Ward,* 491 U.S. at 795 n.5, or when the issuance of a permit involves a purely ministerial decision, *see, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 644 (1981), the *Freedman* safeguards are inapposite. The ordinance here, however, both suppresses speech in advance of its expression and involves more than a merely ministerial requirement that those who propose to use the parks provide their names and contact information so that the city may resolve scheduling conflicts among competing speakers. That the provisions in this ordinance contain discretionary criteria governing whether a permit should issue is all the more reason to require the full *Freedman* safeguards because the surest bulwarks against a potential abuse of such discretion by government regulators are

procedural guarantees that require regulators to seek judicial approval before they may withhold permits and that prevent delay in the resolution of outstanding issues.

2. Licensing schemes take a variety of forms, however, and the procedural safeguards required for these differing schemes to pass constitutional muster need not be identical. Many of the regulatory regimes that affect speech do not involve a limited public resource, such as a park, but instead involve speech that is disseminated in an arena where there is no competition for scarce space and, accordingly, less, if any, reason for requiring a license *in advance of* speech. Permitting schemes that require charitable organizations to register and obtain a license before they may communicate with residents in a locality, if such communications include a solicitation for charitable contributions, are one common example. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988). While such restraints on speech lack the justifications of scarce space and competition for resources that motivate the regulation of public parks, they nonetheless present the same risks of censorship and delay as a park permitting system. Licensing schemes that arise in these more open-ended contexts present a particularly cogent case for the full complement of *Freedman* procedural protections.

Many of these charitable solicitations permitting schemes present serious dangers of abuse of power and censorship based on the content of speech because of the subtle, subjective, and discretionary judgments they call for regarding whether a charity or professional fundraiser has made, or will make, "misleading" or fraudulent solicitations—dangers that are exacerbated in those regimes that require advance submission of scripts of proposed solicitations. *See, e.g., Telco Communications, Inc. v. Carbaugh,* 885 F.2d 1225, 1232-34 (4th Cir. 1989). In addition, unlike permits in the park context, which often involve one-time events, charitable solicitations and adult business licensing schemes, among others, frequently involve an initial application and then periodic renewals. This periodic contact with licensing authorities exacerbates the risk

of censorship by giving licensing authorities the opportunity to punish speakers for the viewpoints they have expressed since receiving their initial permits. *See Lakewood v. Plain Dealer,* 486 U.S. 750, 760 (1988). And whereas petitioners here retain multiple other avenues to convey their message in the event they are denied a park permit, a charity denied a registration in a jurisdiction is completely silenced in that locale. That the organization has no meaningful recourse for communicating its message provides one more reason for this Court to require a prompt judicial *disposition* of any licensing issue in this context, and not merely prompt *access* to judicial review.

Finally, even if this Court decides that the third *Freedman* safeguard, requiring that the licensing authorities shoulder the burden of seeking judicial review, does not apply to a parade or park licensing scheme because time constraints make that safeguard impracticable in that context, there is no reason to extend that logic to those regimes where there is no pressure to resolve a permitting issue by any particular date and time, no conflict among potential speakers, and no excuse for the jurisdiction to deny the applicant at least a provisional permit pending a judicial resolution of the dispute.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE PARK DISTRICT'S ORDINANCE IMPOSES A PRIOR RESTRAINT ON SPEECH.

A. It has long been established that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (per curiam) (quoting *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963)). Prior restraints are presumptively invalid because "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad,*

420 U.S. 546, 559 (1975). Although prior restraints of speech such as licensing schemes are not unconstitutional per se, this Court long has required that they be accompanied by the strictest of procedural safeguards to obviate the dangers of censorship and to prevent an indefinite postponement of the proposed speech.

In *Freedman v. Maryland,* this Court struck down as lacking such safeguards a Maryland statute that required all theater operators to submit to the State Board of Censors the motion pictures they proposed to exhibit and to obtain a license to show the films. The Court determined that the following three procedural protections were necessary and missing from the Maryland censorship regime, which involved a classic prior restraint of speech: (1) any restraint prior to judicial review may be imposed only for a specified brief period during which the status quo must be maintained; (2) a prompt final judicial determination must be assured; and (3) the regulator must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. 380 U.S. at 58-60.

Since *Freedman,* this Court has repeatedly affirmed the vitality of these safeguards in a variety of contexts involving prior restraints on speech. *See, e.g., Southeastern Promotions,* 420 U.S. at 560-62 (finding procedural safeguards accompanying a municipal theater's refusal to allow the performance of "Hair" inadequate where there was no procedure for a prompt judicial determination and the status quo was not maintained pending review); *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 367-75 (1971) (construing a federal customs law permitting the seizure of allegedly obscene materials to comply with the *Freedman* procedural safeguards to preserve its constitutionality); *Blount v. Rizzi,* 400 U.S. 410, 417-20 (1971) (striking down a federal statute authorizing the Postmaster General to impose restrictions on use of the U.S. mails where allegedly obscene materials involved because of the lack of provision for a prompt judicial adjudication and the failure to require the government to initiate judicial proceedings); *Teitel Film Corp.*

v. Cusack, 390 U.S. 139, 141-42 (1968) (per curiam) (finding motion picture censorship ordinance invalid because of the lack of adequate time limits and any provision for a prompt judicial decision).[3]

Despite this established pedigree, the court below found a prior restraint analysis of the Chicago Park District ordinance "unhelpful." Because a park is "a limited space" that calls for some regulation, and because the ordinance did not purport to allow the regulators to deny a permit based on the content of proposed speech in the parks, the lower court treated the ordinance solely as a content-neutral time, place, and manner restriction. *See Thomas,* 227 F.3d at 923-24 (Pet. App. 2a-5a). Yet the Park District's licensing scheme gives "public officials the power to deny use of a forum in advance of actual expression"—the very essence of a prior restraint on speech. *See Ward v. Rock Against Racism,* 491 U.S. 781, 795 n.5 (1989) (quoting *Southeastern,* 420 U.S. at 553). The fact that petitioners may stand alone or in small numbers in a Chicago

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[3] There are two kinds of prior restraints on speech. The first involves actual physical interference with speech in advance of its expression—that is, a literal prior "restraint" of speech. *See, e.g., Thirty-Seven Photographs,* 402 U.S. 363 (confiscating photographs); *Blount,* 400 U.S. 410 (returning mail); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) (arresting marchers in the midst of their march who lacked a permit). The other and more typical type of prior restraint involves a legal requirement that a speaker obtain a permit in advance of expression, where the legal requirement is enforced not by an actual physical disruption of unlicensed speech while it is occurring, but by threatened sanctions or other enforcement action to be taken after the unlicensed speech has been completed. Such laws are often subject to facial challenges before any such sanction has been imposed. *See, e.g., FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990); *Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988); *Lakewood v. Plain Dealer,* 486 U.S. 750 (1988). Both the instant case and many other licensing regimes, such as those regulating charitable solicitations, fall into this second category of prior restraint.

park and express their opposition to the criminalization of marijuana does not negate the fact that if they wish to hold a rally or use sound amplification, they must first obtain a permit. It is as true today as it was fifty years ago that "[l]oud-speakers are today indispensable instruments of effective public speech," *Saia v. New York,* 334 U.S. 558, 561 (1948), and thus, a regulation that requires a permit to use sound amplification in a park imposes a prior restraint on speech. *See id.* at 559-60 (striking down ordinance forbidding the use of sound amplification devices without permission as an invalid prior restraint on speech); *accord Cannabis Action Network, Inc. v. City of Gainesville,* 231 F.3d 761, 769-72 (11th Cir. 2000) (finding sound ordinance an unconstitutional restraint on speech), *petition for cert. filed,* 69 U.S.L.W. 3691 (U.S. Mar. 29, 2001) (No. 00-1503). Accordingly, there is no doubt that the ordinance countenances a prior restraint of speech.

The Seventh Circuit's rejection of the "prior restraint" doctrinal framework had serious consequences for petitioners' constitutional challenge to the ordinance. First, its refusal to treat the Park District's permit requirement as a prior restraint led the court to dismiss as "semantic nit-picking" petitioners' claims that the ordinance is facially invalid because it confers unfettered discretion on city regulators to decide which applicants deserve permits to speak in public parks. *See Thomas,* 227 F.3d at 924 (Pet. App. 5a). The court of appeals paid little heed to the Magistrate Judge's assessment that the ordinance lacked "any neutral criteria" to guide the Park District's decision whether to issue a permit, *see MacDonald v. Chicago Park Dist.,* No. 97 C 2963, 1999 U.S. Dist. LEXIS 7416, at *13 (N.D. Ill. Mar. 8, 1999) (Pet App. 64a), or to the "substantial power . . . to censor" that the ordinance conferred "based on the content or viewpoint of speech." *MacDonald v. Chicago Park Dist.,* No. 97 C 2963, 1998 U.S. Dist. LEXIS 7131, at *27 (N.D. Ill. Apr. 27, 1998) (Pet. App. 33a). *See Thomas,* 227 F.3d at 924-25 (Pet. App. 4a-7a).

Second, because it believed that the ordinance was merely a content-neutral time, place, and manner restriction, the court

found the *Freedman* safeguards inapposite. *See id.* at 926 (Pet. App. 7a-8a). Accordingly, the court held that it was the petitioners who bore the burden of seeking judicial relief from a denial of a park permit. *Id.* (Pet. App. 9a). Because the ordinance did not purport to authorize the city regulators "to evaluate the content or message of the activity regulated," *id.* (Pet. App. 8a), the court saw little reason to question the efficacy or speed of the state common law certiorari avenue to judicial review. Instead, the court concluded that "a more relaxed attitude toward the pace of judicial review" was warranted, *id.* at 928 (Pet. App. 12a), despite the fact that the failure to impose a "deadline" for judicial review, *id.* at 927 (Pet. App. 11a), means that those who wish to hold rallies in the Chicago parks may face an indefinite postponement of their speech pending judicial review.

The court of appeals' refusal to recognize that the ordinance imposes a prior restraint was error. These two First Amendment frameworks are not mutually exclusive. Concededly, the ordinance regulates a scarce governmental resource—city parks—over which there is undoubtedly considerable competition and which call for some form of regulation. Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock,* 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida,* 385 U.S. 39, 47 (1966)). Thus, this Court has recognized that "government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade or rally." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992). At the same time, however, this Court has consistently treated any permitting scheme—at least where there is an element of discretion regarding the issuance of a permit—as involving a prior restraint of speech that must satisfy additional constitutional requirements, regardless of whether the regulation is otherwise a content-neutral regulation of the time, place, and manner of

speech. *Id.*[4]

The Court's ruling in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), in which the Court held that a Dallas regulation of sexually oriented businesses imposed an impermissible prior restraint on speech, illustrates the correct approach. The Fifth Circuit had upheld the licensing scheme as a valid time, place, and manner regulation in reliance on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), without requiring the procedural safeguards set forth in *Freedman*. *FW/PBS*, 493 U.S. at 222 (citing 837 F.2d 1298, 1303 (5th Cir. 1988)). As Justice O'Connor explained, however, in a portion of her opinion joined by three Justices: "Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses." *Id.* at 223 (O'Connor, J., joined by Stevens and Kennedy, JJ.); *accord id.* at 238 (Brennan, J., concurring, joined by Marshall and Blackmun, JJ.) (agreeing that the licensing scheme lacked the requisite safeguards).

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[4] By and large, the circuit courts have agreed. *See, e.g., United States v. Frandsen*, 212 F.3d 1231, 1238 (11th Cir. 2000) (recognizing that although government may regulate the time, place, and manner of expression in parks, "a regulation constituting a prior restraint on expression must also contain certain procedural safeguards as set forth in *Freedman v. Maryland*"); *Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999) ("A regulation may constitute a prior restraint even if it is not content-based."); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 995 (4th Cir. 1995) (en banc) ("[O]therwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the *Freedman* procedural safeguards.").

Justice O'Connor's opinion emphasized that "[l]ike a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license." *Id.* at 226 (O'Connor, J.). Because the Dallas ordinance failed to set an effective limitation on the time within which the licensor's decision must be made and to provide an avenue for prompt judicial review "so as to minimize suppression of the speech in the event of a license denial," *id.* at 229, the regulatory scheme "allow[ed] indefinite postponement of the issuance of a license," *id.* at 227, and was therefore invalid. Although there was disagreement between the three Justices who joined Justice O'Connor's opinion and the three who joined Justice Brennan's opinion as to whether the third *Freedman* safeguard—which requires the regulator to bear the burden of going to court and the burden of proof once in court—applies to a commercial enterprise such as an adult business, *compare id.* at 229-30 (O'Connor, J.), *with id.* at 239-42 (Brennan, J.), there was no quarrel among these six with the proposition that "the first two safeguards are essential." *Id.* at 228 (O'Connor, J.). Only two Justices who dissented in part agreed with the Fifth Circuit's holding that *Freedman* was wholly inapposite because the ordinance was a time, place, and manner regulation. *See id.* at 244-48 (White, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.).

The same logic prevailed in *Forsyth County*, which involved the other evil the *FW/PBS* plurality identified in prior restraint licensing schemes: the potential for the exercise of "unbridled discretion" in the issuance of a permit. *FW/PBS*, 493 U.S. at 225-26 (O'Connor, J.). In considering that ordinance, which required a permit and a fee for parades and assemblies, the *Forsyth County* court acknowledged that regulation of the time, place, and manner of speech in public fora was appropriate. The Court nonetheless held the ordinance invalid because it imposed a prior restraint on speech without adequate safeguards—in that case, without limits on the discretion to be exercised by the administrator in setting the

permit fee. 505 U.S. at 130-31. The Court found fault with the fact that "[t]he decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator." *Id.* at 133.

The key to distinguishing the kinds of regulations involved in *FW/PBS* and *Forsyth County* from those that the Court has upheld as valid time, place, and manner restrictions, *see, e.g., Ward v. Rock Against Racism,* 491 U.S. 781 (1989); *Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981); *Cox v. New Hampshire,* 312 U.S. 569 (1941), is that none of the latter cases authorized officials to exercise any discretion to deny permission to use a public forum. *Cox* upheld a state statute prohibiting a parade or procession without a special license, but was careful to emphasize that the statute was administered in a "fair and non-discriminatory manner," *id.* at 577, and without risk of "uncontrolled official suppression" of opinions on public questions. *Id.* at 578 (citation omitted). Similarly, in *Heffron*, the Court upheld a state rule that those who seek to distribute printed materials within state fairgrounds during a state fair obtain a permit to do so at fixed locations. In treating the rule as a time, place, and manner regulation, the Court noted that space in the fairground was rented in "a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth," 452 U.S. at 644, and thus the rule did not suffer from "the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority." *Id.* at 649. *Ward,* on the other hand, involved no prior restraint at all because the guidelines for use of the Central Park bandshell granted no authority to public officials to forbid speech in advance of its expression in the bandshell, but merely allowed the city to set limits on the volume of performances there. *See* 491 U.S. at 795 n.5.

Thus, the conclusion to be drawn from this Court's precedents is that (1) when a regulation concerning speech does not authorize the advance suppression of speech, *id.*, or (2) when the granting of a license in advance of speech

involves a purely ministerial action, *see Heffron,* 452 U.S. at 644; *cf. Southeastern Promotions,* 420 U.S. at 554 ("Approval [of a permit] was not a matter of routine."), the *Freedman* safeguards do not apply. Thus, if a park regulation merely required applicants to supply their names, contact information, and proposed dates for use of specified parks so that park officials could resolve scheduling conflicts, there would be no need for the *Freedman* requirements. The Park District's ordinance here is not such a ministerial regulation, however, as it "involves appraisal of facts, the exercise of judgment, and the formation of an opinion" by the licensing authority. *Forsyth County,* 505 U.S. at 131 (quoting *Cantwell v. Connecticut,* 310 U.S. 296, 305 (1940)); *see also MacDonald v. Safir,* 206 F.3d 183, 195 (2d Cir. 2000) (finding that the level of discretion dictates whether the burden is on the city commissioner of going to court); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1362 (11th Cir. 1999) ("[T]he cases show that virtually any amount of discretion beyond the merely ministerial is suspect."), *cert. denied,* 529 U.S. 1053 (2000).

That statutory language may be imprecise, as the Seventh Circuit observed, *see Thomas*, 227 F.3d at 924-25 (Pet. App. 4a-7a), is all the more reason to enforce the "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963). In other words, the best insurance against an abuse of the discretionary criteria built into the Chicago Park District ordinance, such as whether there has been a violation of a prior permit or other disqualifying misconduct, *see* note 2, *supra,* are the requirements that the Park District seek court approval of its basis for denying a permit and that the court rule swiftly on the dispute. At the very least, the risk of censorship would be abated if the ordinance guaranteed that the city would permit a proposed rally in the park (when there is no other group that previously requested the same place and time), *unless and until* a court has sanctioned the denial of a permit.

B. The court of appeals acknowledged that several decisions from other circuits had held that licensing schemes

must provide a deadline for judicial review of the proposed suppression of speech, but distinguished these as involving special licensing regimes for sexually oriented businesses.[5] *See Thomas,* 227 F.3d at 927 (Pet. App. 11a). In the court's view, "greater judicial vigilance" is warranted in the adult business context because there regulators are concerned with the content of the businesses' speech, whereas, by contrast, the Park District's ordinance does not "relate to controversial or unpopular expression" and hence does not require the same expeditious judicial disposition. *Id.* at 928 (Pet. App. 12a).

Even if licensing schemes involving adult entertainment are deemed to be content-based, *but see City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47-48 (1986), it is ironic that the Seventh Circuit would refuse to apply the *Freedman* standards to political speech in a park, but would grant their fuller application to adult businesses, which involve what the Court has deemed "expressive conduct" only "within the outer perimeters of the First Amendment." *Barnes v. Glen Theater, Inc.,* 501 U.S. 560, 566 (1991). By contrast, this Court has recognized that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.,* 307 U.S. 496, 515 (1939). As Justice Harlan put it: "The right to assemble peaceably to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value." *Shuttlesworth v. Birmingham,* 394 U.S. 147, 162 (1969) (Harlan, J., concurring). The right to engage in adult entertainment has never been deemed to merit the same level of protection as core political speech in a traditional public

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[5] *See, e.g., Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County,* 58 F.3d 988 (4th Cir. 1995) (en banc).

forum, yet the Seventh Circuit gave less protection to the latter. *Cf. Lorillard Tobacco Co. v. Reilly,* 121 S. Ct. 2404, 69 U.S.L.W. 4582, 4595-4601 (2001) (Thomas, J. concurring).

What is especially troubling about adopting "a more relaxed attitude toward the pace of judicial review" in the case of demonstrations in a park, *Thomas,* 227 F.3d at 928 (Pet. App. 12a), is the consequence of delays that arise in the permitting process. A public rally on the issues of the day, unlike adult entertainment, is frequently time-sensitive; to delay the issuance of a permit for any significant period of time is effectively to foreclose the speech. *Shuttlesworth,* 394 U.S. at 163 ("In contrast [to a movie], timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.") (Harlan, J., concurring). As this Court recognized in *Lakewood v. Plain Dealer*: "Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost." 486 U.S. 750, 758 (1988). At the very least, when core political speech is at issue, a permit should be issued if a reviewing court fails to reach a decision within a reasonably brief period of time. *Cf. Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 894 (6th Cir. 2000) (suggesting the issuance of a provisional license in the adult business context); *11126 Baltimore v. Prince George's County,* 58 F.3d 988, 1001 n.18 (4th Cir. 1995) (en banc) (same). If mere *access* to a judicial forum, be it state or federal, were sufficient, but a prompt decision not required, the second *Freedman* safeguard would be rendered virtually meaningless. *Nightclubs,* 202 F.3d at 893; *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1101 (9th Cir. 1998). As this Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

Nor is there any reason to jettison a requirement that the Park District bear the burden of initiating court proceedings—the third *Freedman* safeguard—to obtain a

judicial officer's approval of the denial of a permit to hold a rally or to use sound amplification equipment in city parks. Relying on *FW/PBS,* the Seventh Circuit held this *Freedman* inapplicable to facially content-neutral regimes such as the ordinance here. *Thomas,* 227 F.3d at 926 (Pet. App. 9a). That reliance was misplaced. Only three Justices endorsed the abandonment of the third *Freedman* safeguard in a situation where they believed the other two safeguards applied, *see FW/PBS,* 493 U.S. at 228-30 (O'Connor, J.), and thus, the third *Freedman* factor has not been repudiated by a majority of the Court.

Even accepting Justice O'Connor's opinion as binding precedent, its rationale does not apply to those who would seek to engage in political speech in a traditional public forum such as a park. The *Freedman* court placed the burden of initiating judicial proceedings on the regulator because the proposed speaker's stake in obtaining a particular license might well be insufficient to give it the incentive to challenge a license denial in court. 380 U.S. at 59. The plurality in *FW/PBS,* by contrast, found the incentives to be quite different when a license to operate an adult business was at issue because there "the license is the key to the applicant's obtaining and maintaining a business," and thus "there is every incentive for the applicant to pursue a license denial through court." *FW/PBS,* 493 U.S. at 229-30 (O'Connor, J.). A potential speaker in a park has more in common with a theater owner who is deciding whether to show an allegedly objectionable motion picture, as in *Freedman,* than it does with a commercial business whose entire livelihood is on the line, as in *FW/PBS.* The Eleventh Circuit appropriately recognized as much in *Cannabis Action Network,* 231 F.3d at 774-75 (placing the burden on the city to deny a permit for a demonstration where the speaker was a nonprofit public interest group that sought a one-time permit to engage in nonprofit, political activities, rather than a commercial enterprise).

The fundamental defect in the Seventh Circuit's reasoning in rejecting both a requirement that judicial proceedings

regarding a permit be promptly resolved and that the Park District bear the burden of initiating these proceedings, is that the court underestimated the significant potential for pretextual permit denials triggered by covert hostility toward unpopular speakers or controversial viewpoints. The U.S. Reports are filled with instances in which this Court concluded that elastic criteria permitting a regulator to deny a license for speech impermissibly authorized clandestine censorship based on the content of speech, even though the regulatory regime on its face, in contrast to the statute in *Freedman,* did not purport to establish a censorship system. *See, e.g., Plain Dealer,* 486 U.S. at 763-64 ("[B]ecause without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker," government may not place conditions, even if content-neutral, on the issuance of a permit if they depend on a government official's "boundless discretion"); *Hynes v. Mayor of Oradell,* 425 U.S. 610, 622 (1976) (concluding that the failure to explain what "identification" is required in advance of canvassing gives police "the *effective* power to grant or deny permission to canvass for political causes"); *Saia,* 334 U.S. at 562 ("Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice."). As a Florida district court recently observed in rejecting the Seventh Circuit's analysis in a similar case involving permits for festivals:

> [T]he danger in a permitting scheme that seeks to restrict speech in advance is that public officials will be able to "filter" protected speech by selectively granting permits on the basis of content. This danger can exist even where the permitting scheme seeks only to restrict expressive activity, rather than expression itself, because an overly broad permitting scheme can still provide officials with a mechanism for covertly discriminating on the basis of content.

Florida Cannabis Action Network, Inc. v. City of Jacksonville, 130 F. Supp. 2d 1358, 1365-66 (M.D. Fla. 2001).

It is also for this reason that it makes no difference whether the ordinance here is termed a "licensing," as opposed to a "censorship," scheme, if the discretion it confers is broad enough to allow the Park District to abuse its authority and deny a permit whenever it disagrees with the message to be conveyed in the park. And whether the suppression of speech is based on legitimate content-neutral criteria or not, the fact remains that the speaker is silenced under this ordinance until a court—after proceedings brought by the proposed speaker—says otherwise. *See FW/PBS,* 493 U.S. at 226 ("Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license."). Thus, in our view, the court of appeals erred in refusing to extend the full complement of procedural safeguards announced in *Freedman* to the Park District's ordinance.

II. REGARDLESS OF WHETHER IT FINDS ALL THREE *FREEDMAN* PROCEDURAL SAFEGUARDS FULLY APPLICABLE TO A LICENSING SCHEME INVOLVING A PARK, THESE SAFEGUARDS ARE VITAL IN CONTEXTS THAT DO NOT INVOLVE A LIMITED PUBLIC RESOURCE.

As the court of appeals appropriately recognized, parks are limited public resources that require some governmental management so that multiple rallies are not held at the same time and so that dueling sound equipment does not cause one speaker to drown out another. *Thomas,* 227 F.3d at 924 (Pet. App. 3a). As this Court recognized in *Cox v. New Hampshire,* regulation of such limited public spaces through licensing schemes serves to facilitate "proper policing" and "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to

minimize the risk of disorder." 312 U.S. 569, 576 (1941) (citation omitted); *accord Forsyth County,* 505 U.S. at 130.

Permitting schemes that involve a prior restraint on expression take many forms, however, and do not require identical procedural safeguards to assure their constitutionality. *E.g., United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 374 (1971) (noting that constitutionally permissible time limits for determinations may vary in different contexts). Many of these regulatory regimes do not involve a limited government resource, such as a park, but instead involve speech that arises in a setting where there is no competition for scarce space and accordingly, where there is much less, if any, justification for requiring a license *in advance of* speech.

Licensing regimes that require charitable organizations to register and obtain a license before they may even send letters via the U.S. mails that include a solicitation for charitable contributions are a prime example. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988); *American Target Advertising, Inc. v. Giani,* 199 F.3d 1241 (10th Cir.), *cert. denied,* 121 S. Ct. 34 (2000). Such prior restraints on speech lack the rationales of scarce space and competing speakers, and yet they present the very same potential for censorship and delay as a park licensing system. Licensing schemes in these more open-ended settings, where there is often no legitimate reason for a prior restraint on speech, present an even more compelling scenario for the application of the full panoply of *Freedman* procedural protections than do prior restraints involving public streets and parks.[6]

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[6] There are other licensing schemes that at least indirectly affect free speech, such as regimes that require licenses as a condition of practicing law or of engaging in various securities transactions. *See Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978). "Regulations on entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's

(continued...)

This Court has recognized that "charitable appeals for funds . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980). In *Riley,* the Court made clear that the *Freedman* safeguards applied to licensing schemes governing charitable solicitations. The North Carolina Charitable Solicitations Act required professional fundraisers to await a determination regarding their license application before engaging in solicitation. *Riley,* 487 U.S. at 801. The Court assumed, without deciding, that the State's interest justified requiring fundraisers to obtain a license before soliciting, but held that "such a regulation must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" *Id.* at 802 (quoting *Freedman v. Maryland,* 380 U.S. 51, 59 (1965)). That requirement was not met there because the statute did not purport to set a deadline for when a determination would be made and therefore "permit[ted] a delay without limit." Because professional fundraisers were not permitted to solicit as soon as their permit applications were filed, "delay compel[led] the speaker's silence," and therefore, the Court concluded, the licensing provision could not stand. *Id.*

Both before and after *Riley,* the federal courts have held

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[6](...continued)
fitness or capacity to practice' the profession." *Lowe v. Securities & Exch. Comm'n,* 472 U.S. 181, 228 (1985) (White, J., concurring) (quoting *Schware v. Board of Bar Exam'rs,* 353 U.S. 232, 239 (1957)); *see also Thomas v. Collins,* 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring). And, of course, as discussed in Part I above, licensing schemes are common in the adult business context, although these present their own distinct issues because of the commercial setting in which the speech arises and the secondary effects of such businesses on the community.

the *Freedman* safeguards applicable to licensing schemes that prohibit charitable solicitation before regulatory authorities have issued a permit. *See, e.g., Giani,* 199 F.3d at 1253-54 (considering *Freedman* safeguards); *Famine Relief Fund v. West Virginia,* 905 F.2d 747, 753 (4th Cir. 1990) (finding that charitable solicitations statute did not comply with *Freedman* because it imposed the burden on the charity to seek an administrative hearing and judicial review after its registration is denied, did not clarify who bore the burden of proof in these proceedings, and did not permit the solicitation of funds while judicial review was pending); *Fernandes v. Limmer,* 663 F.2d 619, 628 (5th Cir. 1981) (holding that ordinance governing literature distribution and funds solicitation in an airport lacked the *Freedman* safeguards because it failed to assure prompt judicial review of permit denials and because "the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights"), *cert. dism'd,* 438 U.S. 1124 (1992); *International Soc'y for Krishna Consciousness, Inc. v. Rochford,* 585 F.2d 263 (7th Cir. 1978) (holding that regulation of distribution or literature and solicitation of contributions in airports lacked the *Freedman* safeguards in failing to provide for either administrative or judicial review of a denial or revocation of a license); *American Charities for Reasonable Fundraising Regulation v. Pinellas County,* 32 F. Supp. 2d 1308 (M.D. Fla. 1998) (holding that the first two *Freedman* safeguards apply to a charitable solicitation licensing scheme), *aff'd in relevant part,* 221 F.3d 1211 (11th Cir. 2000).[7]

There is no basis for disturbing or diluting the *Riley* court's conclusion that the *Freedman* safeguards—including

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[7] The district court relied on *FW/PBS,* however, to support its conclusion that the ordinance, which it considered a "non-censorship licensing scheme," need not satisfy the third safeguard imposing the burden of proof on the decisionmaker to seek judicial review. 32 F. Supp. 2d at 1326. As explained below, we believe that all three *Freedman* safeguards should apply in this context.

the one requiring a regulator to "go to court" before withholding a permit to speak—apply to such licensing schemes and every reason to reaffirm it. First and foremost, the governmental justification for a prior restraint on speech where there is no need to mediate conflicts regarding the time, place, and manner of expression, is considerably weaker than in the setting of a public park or street. Whereas it may be impossible to hold two rallies in the same park on the same day, there is no evident limitation on the number of canvassers who may solicit funds door-to-door, or on the number of pieces of mail containing charitable solicitations that may be delivered.

To be sure, this Court has acknowledged that a state may protect its citizens from fraudulent solicitation by requiring "a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell v. Connecticut,* 310 U.S. 296, 306 (1940). But there is a substantial difference between such a ministerial reporting requirement and the now-prevalent licensing regimes that permit public officials, in the exercise of broad discretion, to deny permits to engage in protected speech because a charity or professional fundraiser has failed to satisfy expansive and often vague permitting requirements. *See, e.g., Giani,* 199 F.3d at 1250-53 (invaliding various provisions of ordinance governing solicitation that conferred unbounded discretion on regulators); *Fernandes,* 663 F.2d at 628-33 (same); *Gospel Missions of America v. Bennett,* 951 F. Supp. 1429, 1443- 47 (C.D. Cal. 1997) (same).

Many of these charitable solicitation licensing schemes are rife with the potential for abuse and censorship based on the content of speech, for they often involve subtle and discretionary judgment calls regarding whether a charity or professional fundraiser has made, or will make, "misleading" solicitations, in contrast to the "comparably objective decisions on allocating public benefits" such as a park, school auditorium, or municipal theater. *Cf. National Endowment for*

the Arts v. Finley, 524 U.S. 569, 586 (1998). Indeed, it is not unusual for a jurisdiction, on the basis of a claimed (and legitimate) interest of preventing fraud and misrepresentation in solicitation, to require a charity wishing to engage in charitable solicitation to demand copies of proposed solicitations before issuing a permit. *See, e.g., Telco Communications, Inc. v. Carbaugh,* 885 F.2d 1225, 1232-34 (4th Cir. 1989) (striking down provision of Virginia charitable solicitation law that required the submission of scripts in advance of proposed oral solicitations); *Telco Communications, Inc. v. Barry,* 731 F. Supp. 670, 682-83 (D.N.J. 1990) (striking down New Jersey provision requiring filing of a copy of any oral solicitation prior to the solicitation).

What this Court has said about door-to-door canvassing, however, holds equally true for all communications that involve charitable solicitation, whether they be made in person, by telephone, or by mail:

> Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Schneider v. New Jersey (Town of Irvington), 308 U.S. 147,

164 (1939). As the Court summed up: "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees." *Id.* It is to obviate this risk of censorship that, at a bare minimum, the *Freedman* safeguards are required for these types of permitting schemes.

Second, applications for permission to demonstrate in the parks tend to involve one-time events (although that admittedly is not the case here). Other licensing systems, however, such as in the charitable solicitations and adult business contexts, frequently involve an initial application and then periodic—often annual—renewals. *See, e.g.,* Fla. Stat. ch. 496.405 (requiring charitable organizations to file an initial registration statement, and a renewal statement each year thereafter, with Florida regulators); *Nightclubs,* 202 F.3d at 887 (city ordinance required licenses for sexually oriented businesses to be renewed annually); *Famine Relief,* 905 F.2d at 749 (West Virginia law required annual registration for charitable organizations). These repeated renewals pose special dangers because they give licensing authorities the opportunity to punish speakers for viewpoints expressed since they received their initial permits.

This Court found the annual licensing requirement in *Plain Dealer* to be a particularly troubling feature of the Ohio newsrack regulation, noting that "[w]hile perhaps not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted, a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern." 486 U.S. at 760 (citations omitted); *see also Jones v. City of Opelika,* 316 U.S. 584, 615 n.5 (1942) (Murphy, J., dissenting) ("The uncontrolled power of revocation lodged with the local authorities is but the converse of the system of prior licensing struck down in Lovell v. Griffin . . . .") (citation omitted), *vacated,* 319 U.S. 103, 104 (1943) (per curiam) (adopting reasoning of dissenting opinions in 316 U.S. 584); *Graff v. City of Chicago,* 9 F.3d 1309, 1329 (7th Cir. 1993) (en banc)

(Flaum, J., concurring) (reasoning that the fact that the full range of discretionary criteria did not apply to renewals of newsstand licenses indicated "that the Ordinance neither was intended to promote nor in fact dangerously facilitates content discrimination in the licensing of newsstands"). The *Freedman* safeguards, again, are vital in this context to prevent public officials, faced with annual renewals from an unpopular nonprofit organization, from using discretionary licensing provisions as a pretext for disciplining the speaker for controversial speech.

Nor is there any reason to relieve officials of a duty to comply with the third *Freedman* safeguard—the burden of going to court and the burden of persuasion once in court—before they may deny a charitable solicitations permit. In suggesting that this safeguard was inapplicable to adult business licensing schemes, Justice O'Connor's opinion in *FW/PBS* cited both the ministerial nature of the licensing determination under the Dallas ordinance and, even more importantly, the adult business's strong financial incentive to pursue a license denial in court. 493 U.S. 229-30. These rationales have no more force in the context of a charitable solicitations licensing regime than they do with respect to parks. *See* Part I(B), *supra*. A nonprofit organization such as Public Citizen, which engages in direct mail charitable solicitation campaigns nationwide, has little financial incentive to challenge a denial of a license in most jurisdictions. Nor does a pamphleteer in an airport or a door-to-door peddler possess such an incentive. *Cf. Cannabis,* 231 F.3d at 774-75 (holding that nonprofit organization engaged in political speech had no financial incentive to challenge the city's denial of a street closing permit). Instead, a charity is likely to be intimidated into censoring its own speech rather than risk sanctions or injury to its reputation in the jurisdiction. *See Plain Dealer,* 486 U.S. at 757-58 (describing the risks of self-censorship). Such an organization is situated identically to a film distributor, who, as acknowledged in *Freedman,* may be "unwilling to accept the burdens and delays of litigation in a

particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country." 380 U.S. at 59.

Finally, the absoluteness of the prohibition on speech when a charitable organization is denied a license to engage in charitable solicitation distinguishes it from the denial of a permit to hold a rally or march in a parade. Whereas the petitioners here retain multiple other avenues to convey their message—and, indeed, the existence of "ample alternative channels for communication of the information" is a prerequisite for upholding any time, place, and manner restriction on such speech, *Clark v. Community Creative Non-Violence,* 468 U.S. 288, 293 (1984)—a charity denied a registration in a jurisdiction is completely silenced in that locality. That the organization has no meaningful alternative for getting out its message provides even further reason for this Court to require a prompt judicial *disposition* of any licensing issue in this context, rather than mere *access* to judicial review—a process that ordinarily takes months, if not years, and during which time the speaker has been silenced.

* * *

Although this case focuses on permission to use a park, there are numerous types of permitting schemes, many of which, such as charitable solicitation licensing regimes, do not involve a limited public resource or competition among speakers. These permitting schemes often present significant opportunities for official abuse, delay, and censorship based on the content of speech. The best way to obviate that risk is to require the full range of *Freedman* safeguards in all of these open-ended licensing settings.

CONCLUSION

For the foregoing reasons, Public Citizen respectfully urges the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

Bonnie I. Robin-Vergeer
Counsel of Record
Alan B. Morrison
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

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Counsel for Public Citizen, Inc.